

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
Implementation of the Cable)	CS Docket No. 01-290
Television Consumer Protection)	
and Competition Act of 1992)	
)	
Development of Competition and Diversity)	
in Video Programming Distribution:)	
Section 628(c)(5) of the Communications Act)	
)	
Sunset of Exclusive Contract Prohibition)	

To: The Commission

**REPLY COMMENTS OF THE
NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

1. The National Rural Telecommunications Cooperative (NRTC), by its attorneys, is pleased to submit these Reply Comments in response to the Comments filed in the above captioned proceeding.¹ With the exception of a handful of cable related interests, commenters in this proceeding were unanimous in their conviction that the Program Access rules remain necessary to preserve and protect competition and diversity in the distribution of video programming. The continuation of these rules is particularly critical in rural America, where two fiercely competitive direct broadcast satellite (DBS) providers are often the only source of competition to cable operators.

¹ Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 01-290, FCC 01-307 (Released October 18, 2001) (NPRM).

I. REPLY COMMENTS.

A. Non-Cable MVPD Commenters Uniformly Urged the Commission to Extend the Program Access Rules.

2. All non-cable commenters in this proceeding – and even small independent cable companies – joined NRTC in stressing the necessity of extending the Program Access rules in order to preserve and protect competition and diversity in the distribution of video programming.² Many commenting parties shared the same underlying concern: that despite growing competition within the multichannel video programming distributor (MVPD) market, loss of the Program Access rules at this stage would hobble further competition from non-cable and small independent cable MVPD providers.³

3. Although alternate program distribution technologies exist, the Commission has recognized that “DBS is the principal competitor to cable television service.”⁴ In many rural parts of the country, DBS is frequently the *only* option for consumers.⁵ While acknowledging

² Commenters supporting extension of the Program Access rules represented the full scope of MVPD providers, including Open Video Systems, DBS providers, multipoint multichannel distribution services and small cable companies. Of approximately 30 parties filing Comments in the proceeding, only five cable related interests – AT&T, AOL Time Warner Inc. (AOL), Cablevision, iNDEMAND and the National Cable & Telecommunications Association (NCTA) (“the Cable Interests”) – supported termination of the rules. The Cable Interests overstated the developing competition within the MVPD market and glossed over the fact that loss of the Program Access rules would enable vertically integrated programmers to withhold critical programming from competitors.

³ Many commenters cite the same FCC statistics in showing that the Program Access rules are necessary: (1) almost 8 out of 10 MVPD subscribers obtain programming through cable; (2) 99 of 281 – or 35% – of satellite delivered programming networks are vertically integrated; (3) 9 of the largest 20 video programming services in terms of subscribership are vertically integrated; (4) 11 out of 20 – more than half – of programming services with the highest prime time ratings are vertically integrated (e.g., Comments of Broadband Service Providers Association, pp. 6, 8; Comments of Carolina Broadband, Inc. pp. 5-6; Comments of the Competitive Broadband Coalition, p. 6; Comments of Gemini Networks, Inc., p. 3; Comments of the Independent Multi-Family Communications Council, pp. 4-5; NRTC Comments, pp. 4-6; Comments of Qwest Broadband Services, Inc. pp. 5-6).

⁴ Seventh Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 22 CR 1414, FCC 01-1, ¶61 (“Seventh Cable Competition Report”). DBS held 15.38% of MVPD marketshare; MMDS held .83%; SMATV held 1.78%; HSD held 1.75%; and OVS held .07%. (Seventh Cable Competition Report, Table C-1).

⁵ The Commission on occasion has repeated cable industry data claiming that the number of homes with access to cable (“Homes Passed”) is almost 97% (See, Seventh Cable Competition Report, ¶18). NRTC believes that the 97% Homes Passed rate is vastly inflated. A joint report by the National Telecommunications and Information Administration and the Rural Utilities Service found that the actual percentage of Homes Passed could be as low as (continued . . .)

the recent growth of DBS, the two currently competing DBS providers, DIRECTV, Inc. (DIRECTV) and EchoStar Satellite Corporation (EchoStar), established that access to programming controlled by vertically integrated cable incumbents remains a crucial element of their continued success.⁶

4. EchoStar stated that due to the Program Access rules, DBS has grown “into a vigorous competitor today” and has limited the ability of the cable industry “to exert their market power over rates and services.”⁷ EchoStar noted that “so long as each of the competing platforms is able to offer roughly the same menu of program offerings, consumers can choose the provider they want based primarily on price (as well as quality of service). Such a market limits the flexibility of cable operators to continually raise prices as they have historically done.”⁸

5. DIRECTV likewise stated that an “alternative MVPD cannot compete with incumbent cable systems if it cannot offer subscribers popular programming.”⁹ Because vertically integrated cable programmers could “lock up” their programming if the Program Access rules were allowed to terminate, DIRECTV noted that it would stand to lose access to at least 45 programming networks.¹⁰

6. Other MVPD providers face similar threats. For example, RCN, a nationwide terrestrial cable overbuilder, pointed out that access to programming “is the heart of MVPD

81% (Advanced Telecommunications In Rural America: The Challenge of Bringing Broadband Service to All Americans, April, 2000, fn. 62). In addition, a recent New York Times article stated that the national percentage of homes with access to cable could be as low as 78.4%, with many states having cable passage rates below 70% (Look, Up in the Sky! Big Bets on a Big Deal, N.Y. Times, October 30, 2001, at C-1). See, NRTC Comments, pp. 7-9.

⁶ DIRECTV Comments, pp. 2-5, EchoStar Comments pp. 6-12.

⁷ EchoStar Comments, p. 2.

⁸ EchoStar Comments, pp. 6-7.

⁹ DIRECTV Comments, p. 4.

¹⁰ DIRECTV Comments, pp. 3-4, Exhibit A.

competition ... (and) the single most important selling point for any MVPD.”¹¹ Carolina Broadband, Inc., a facilities-based broadband service provider, stated that “lack of fair and reasonable access to programming will inexorably lead to the failure of competition.”¹² The Competitive Broadband Coalition argued that the prohibition on exclusive contracts “continues to be essential to ensure the development of a competitive market for video distribution.”¹³

7. The American Cable Association (ACA), an association of small independent cable companies, showed that loss of the Program Access rules would enable cable-affiliated programmers to withhold programming from smaller cable systems. The ACA highlighted ten markets where the program offerings of independent cable providers would be reduced by 30% to 42% if the Commission allowed the Program Access rules to terminate. The Braintree Electric Light Department, a municipally owned utility offering cable programming, stated similarly that it would lose over 42% of its programming if the rules were to sunset.¹⁴ In the same vein, CBI stated that if the prohibition on exclusive contracts were to end, cable operators would “effectively remov[e] the programming of 35% of the satellite delivered national programming networks – the 35% with the largest subscribership – from the reach of their competitors.”¹⁵

8. Some commenters stated that loss of even a small percentage of programming would have a serious detrimental effect on competition. The American Public Power Association stated

¹¹ RCN Comments, pp. ii, 26. (“...if competition is to succeed, even to a modest degree, there must be a regulatory climate which fosters it.”). *Id.*, p. 28.

¹² Carolina Broadband Inc Comments., p. 4. See Also, RCN Comments, p. 25.

¹³ Competitive Broadband Coalition Comments, p. 6.

¹⁴ Braintree Electric Light Department Comments, p. 1.

¹⁵ CBI Comments, p. 5.

that “denial of even a handful of ‘must have’ channels can destroy a new provider’s ability to compete effectively against an entrenched incumbent.”¹⁶

9. Continued access to a full menu of regional sports programming, which the FCC has identified as a critical component to MVPD competition, is particularly important.¹⁷ The Joint Commenters, a group representing wireline broadband, wireless cable and private cable operators, pointed out that “the loss of even a small amount of regional sports programming may cause irreparable harm” to effective competition against cable MSOs.¹⁸ RCN echoed the same theme: “having, for example, 85% of the local sports programming is not 85% as good as having 100%; it is a significant competitive disadvantage, and this is true whether we have 75% or 85% or even 95%.”¹⁹

10. The cable industry’s ability to deprive competitors of popular, critical programming, as well as “must have” niche programming (e.g. regional sports) creates a significant threat to the continued viability of MVPD competition. Continuation of the Program Access rules is the best way for the Commission to address this competitive imbalance and enhance competition by fostering a diversity of programming within the MVPD market.

¹⁶ American Public Power Association Comments, p. 2.

¹⁷ The Commission recently stated that “lack of access to programming, especially sports programming, remains a significant barrier to entry and an impediment to the successful development of a competitive MVPD business.” (Seventh Cable Competition Report, ¶181)

¹⁸ Joint Comments, p. 13.

¹⁹ Joint Comments, p. 13 (citing Testimony of Robert Currey, Vice Chairman, RCN Corporation, Before the United States Senate Judiciary Committee on Antitrust, Business Rights and Competition, at 16 n. 22 (April 4, 2001)). Several other commenters also stressed the importance of regional sports programming to the development of effective competition; See e.g., Broadband Service Providers Association Comments, pp. 11-19; Everest Midwest Licensee, LLC Comments, pp. 4-6; Gemini Networks, Inc. Comments, p.5; Independent Multi-Family Communications Council Comments, pp. 4-6.

B. The Program Access Rules Should be Extended to Terrestrially Delivered Programming.

11. Many commenters addressed the transparent efforts of the vertically integrated cable industry to evade the Program Access rules by switching delivery technology from satellite (which is subject to the rules) to cable or terrestrial wireless (which is not).²⁰ In addition, many of the commenters stressed the fact that the Commission is not powerless to address this problem. Carolina Broadband, Inc. for example, stated that the Commission should recognize that “Congress did not intend to create a loophole that would allow vertically integrated cable providers to circumvent its program access rules.”²¹ Other commenters also argued that Congress had no intention of allowing cable operators and vertically integrated programmers to artificially circumvent the Program Access requirements simply by shifting delivery technologies.²²

12. Vertically integrated programmers should not be permitted to evade the Program Access rules simply by delivering satellite cable programming to subscribers via terrestrial means.²³ Such duplicity clearly undercuts competition and violates the spirit if not the letter of the Program Access rules.

II. CONCLUSION.

13. DBS has developed into a potent competitive force to cable, but the Program Access rules continue to be necessary to preserve competition and protect diversity in the distribution of

²⁰ See Carolina Broadband, Inc. Comments, pp. 7-9; EchoStar Comments, pp. 18-20; Gemini Networks, Inc. Comments, pp. 5-6; RCN Comments, pp. 29-35; World Satellite Network, Inc. Comments, pp. 7-8.

²¹ See Carolina Broadband, Inc. Comments, p. 8.

²² See e.g., RCN Comments, pp. 31-35 (citing substantial legislative history).

²³ Memorandum Opinion and Order, *DIRECTV, Inc., et al, v. COMCAST Corporation, et al, Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints*, 22 CR 898, 2000 FCC LEXIS 6130, FCC 00-404, (Released November 20, 2000).


video programming. As has been demonstrated, allowing the Program Access rules to sunset at this point would thwart competition between DBS and cable and would disproportionately impact rural consumers across the country. For this reason, NRTC urges the Commission to extend the Program Access rules and to expand their scope to cover terrestrially delivered programming that was previously delivered via satellite.

Respectfully Submitted,

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January 7, 2002

Certificate of Service

I HEREBY CERTIFY that on this 7th day of January 2002, a true and correct copy of the foregoing **Reply Comments of the National Rural Telecommunications Cooperative in the Implementation of the Cable Television Consumer Protection and Competition Act of 1992** was submitted electronically to the Federal Communications Commission and served via first-class mail upon the following:

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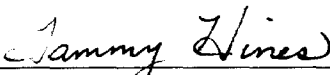
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